86-861

SUPREME COURT, U.S.
FILED
NOV 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

L & L MARINE SERVICE, INC.,
Petitioner,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 25, 1986

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QUESTIONS PRESENTED

1. Whether this Court should resolve the current split of authority in the Circuit Courts of Appeals on the substantive federal maritime legal issue of whether an implied warranty of seaworthiness exclusion in a maritime time hull insurance policy excludes coverage only upon a showing by the insurer that the insured had actual knowledge of a vessel's unseaworthy condition.

2. Whether, under *Standard Oil Company v. United States,* 340 U.S. 54 (1950), and *Queen Insurance Company of America v. Globe & Rutgers Fire Insurance Company,* 263 U.S. 487 (1924), federal maritime law should follow English maritime law and require the insurer to show the vessel owner had actual knowledge of the unseaworthy condition before coverage may be denied under the implied warranty of seaworthiness exclusion in maritime time hull insurance policies.

LIST OF PARTIES

All parties to the proceeding below are listed in the caption of this petition. Petitioner L & L Marine Service, Inc.'s subsidiaries, affiliates, and entities with a pecuniary interest in the outcome of this case are as follows:

World Enterprises, Inc.

L & L Marine Service, Inc.

General Marine, Inc.

Weaver Shipyard and Drydock, Inc.

Universal Salvage Company

Emerald Marine Service, Inc.

Globe Barge, Inc.

Globe Chemical, Inc.

Inland River Transportation Corporation

Pensacola Terminals, Inc.

Contratistas en Embarcaciones de Puerto Rico, Inc.

Liberty Federal Insurance Company, Ltd.

General Supply Company

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

L & L MARINE SERVICE, INC.,
Petitioner,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

L & L Marine Service, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 796 F.2d 1032 (1986). The opinion is reprinted as Appendix A (hereinafter "App. A at A-1") to the Petition. The memorandum opinion of the District Court is unreported. It is reprinted as App. B at A-14 to the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1986. App. C at A-21. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated August 27, 1986. App. C at A-22. The jurisdiction of this Court to review the Court of Appeals judgment is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case arises out of the capsizing and eventual total loss in 1982 of L & L Marine Service, Inc.'s (hereinafter "L & L") Barge P-2 (hereinafter "P-2"). L & L made claim for the agreed policy value of the barge under its time hull policy. The Insurance Company of North America (hereinafter "INA") denied L & L's claim solely on grounds that L & L had failed to exercise due diligence to maintain P-2 in a seaworthy condition as required by the policy.[1]

L & L filed a multi-count suit in 1983 invoking jurisdiction under 28 U.S.C. §1332. The case was tried to a jury. The District Court dismissed all counts except L & L's time hull policy claim. The District Court instructed the jury, over L & L's objection, that L & L's duty to exercise due diligence meant INA could deny recovery under the policy upon a finding that

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[1] The Seaworthiness Clause in the policy provided:

> This Company [INA] shall not be liable for any loss, damage or expense arising out of the failure of the Assured [L & L] to exercise due diligence to maintain the vessel in a seaworthy condition after attachment of this policy; the foregoing, however, not to be deemed a waiver of any warranty of seaworthiness implied at law.

L & L's negligence was a proximate cause of P-2's unseaworthy condition.[2] The jury returned a verdict in favor of INA.

At trial and on appeal, L & L contended the Fifth Circuit had construed the *exact* seaworthiness clause contained in INA's insurance contract to require the insurer to prove the insured had *actual knowledge* that the vessel was unseaworthy before coverage could be denied based upon a failure to exercise due diligence. The Court of Appeals expressly rejected the Fifth Circuit's "more stringent 'knowing' standard," and held the District Court's jury instruction was not erroneous and affirmed the judgment. App. A at A-7 and 9. This Petition concerns only L & L's time hull policy claim.

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[2] The District Court's jury instruction provided in pertinent part:

> Your verdict must be for defendant [INA] if you believe that plaintiff failed to exercise *due diligence* to maintain the P-2 barge in a seaworthy condition at the start of the voyage from Pennsacola, Florida on December 13, 1982, and that such failure caused the vessel P-2 to capsize and subsequently to be sunk.
>
> * * *
>
> The term "*due diligence*" *as used in these instructions means the exercise of care to be expected of a resonably prudent vessel owner.* (emphasis added).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case misconstrued the cases relied upon in reaching its decision, relied upon dicta, and created, without justification, a conflict between the Eighth Circuit and the Fifth Circuit. The Eighth Circuit's holding directly conflicts with the holding in *Insurance Company of North America v. Board of Commissioners,* 733 F.2d 1161, 1165 (5th Cir. 1984) where the Court construed the *exact* insurance provision to require an insured's *actual knowledge* of an unseaworthy condition before coverage could be denied. If the Eighth Circuit's decision is allowed to stand, it will significantly burden interstate commerce and shift the burden of risk between marine insurers and operators in the maritime industry.

I. The Existing Split Of Authority In The Circuit Courts Of Appeals With Respect To The Interpretation Under Substantive Federal Maritime Law Of The Implied Warranty Of Seaworthiness Exclusion In Maritime Time Hull Insurance Policies Should Be Resolved.

A. The Eighth Circuit's Decision Squarely Conflicts With Decisions Of The Fifth Circuit Which Hold The Insured Must Have Actual Knowledge Of An Unseaworthy Condition Before Coverage Can Be Denied.

American maritime law implies into every time hull insurance policy a warranty of seaworthiness. In a line of cases, the Fifth Circuit has noted this "implied warranty of seaworthiness" is, in fact, not a warranty, but rather an exclusion which expressed the "negative warranty of seaworthiness implied by law."[3] The

[3] Since the standard of seaworthiness is solidly entrenced in federal maritime jurisprudence, e.g., *Saskatchewan Govt. Ins. Office v. Spot Pack, Inc.,* 242 F.2d 385 (5th Cir. 1957), federal maritime law must be applied. *Fireman's Fund Insurance Co. v. Willburn Boat Co.,* 300

import of such a "negative warranty" and the standard of due diligence required was explained in the seminal case of *Spot Pack, Inc.* 242 F.2d at 388. There, the Court explained the insured's duties as follows:

> Is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. *It is, rather, stated in the negative that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition.* And unlike a breach of warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this "negative" burden is merely a denial of liability for a loss or damage caused proximately by such unseaworthiness (emphasis added). *Id.*

The Spot Pack opinion makes clear that:

> In such a time policy, it is only . . . where, with the *privity of the assured,* the ship is sent to sea in an unseaworthy state [that] the insurer is not liable for any loss attributable to seaworthiness.

242 F.2d at 390 (emphasis in the original).[4] The insurer has the burden of establishing all elements of this defense.

F.2d 631 (5th Cir. 1962) (on remand), *cert. denied,* 370 U.S. 925 (1963). The Eighth Circuit's reliance on several New York state opinions, e.g., *King v. Liverpool & London & Globe Insurance Co.,* 37 Misc.2d 882, 238 N.Y.S.2d 799 (N.Y.Sup.Ct. 1964); *Berwind v. Greenwich Insurance Co.,* 114 N.Y. 231, 21 N.E. 151 (1889), was therefore in error.

[4] The standard of due diligence required under the implied warranty of seaworthiness which is detailed in *Spot Pack* is in accord with the well settled English rule for time policies which provides:

> In a time policy there is no implied warranty that the ship shall be seaworthy at any state of the adventure, but where, with the

The legal standard of due diligence set forth in *Spot Pack* has been considered and uniformly endorsed by the Fifth Circuit. In *Tropical Marine Products v. Birmingham Fire Insurance Co. of Pennsylvania,* 247 F.2d 116, 119 (5th Cir.), *cert. denied,* 355 U.S. 903 (1957), a Panel Opinion by the Fifth Circuit stated the rule as being that "the owner or those in privity with him *will not knowingly* send the vessel to sea in a deficient condition" (emphasis added). In *Lemar Towing, Inc. v. Fireman's Fund Insurance Co.,* 352 F.Supp. 652 (E.D. La. 1972), *aff'd,* 471 F.2d 609 (5th Cir.), *cert. denied,* 414 U.S. 976 (1973), the Court noted that "to escape liability by way of this contention *the underwriter must prove that the ship owner had knowledge of this unseaworthy condition,* if in fact it did exist, and that said condition was the proximate cause of the loss" (emphasis added). 352 F. Supp. at 660. Again, in *D. J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.,* 1979 A.M.C. 595 (E.D. La. 1977), *aff'd,* 608 F.2d 145 (5th Cir. 1979), *cert. denied,* 449 U.S. 830 (1980), the Court stated the rule as being that "the insured owner *will not knowingly or in bad faith* allow the vessel to go to sea in an unseaworthy condition." *Id.* at 598 (emphasis added).

More recently, in *Gregoire,* 559 F. Supp. at 601, the Court explained:

> privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

Marine Insurance Act of 1906, 6 Edw. 7 c. 41, § 39(5). *See also, Spot Pack,* 242 F.2d at 388; *Gregoire v. Underwriters at Lloyds,* 559 F. Supp. 596, 598 (D. Alaska 1982). The shipowner is only liable if he had "knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the perils of the sea." *The Eurysthenes,* [1976] 2 All E.R. 243, 251, *quoted in Gregoire,* 559 F. Supp. at 598.

> [T]hat in a time hull policy of marine insurance there is no implied warranty that a vessel will not break ground in an unseaworthy condition. Where, however, the owner of the vessel or those in privity with him send their vessel to sea *knowing it to be unseaworthy,* the insurer is not liable for damages proximately caused by the unseaworthiness (emphasis added).

Id. at 601.[5]

Finally, the Fifth Circuit has construed the *exact* clause contained in INA's insurance contract in the present case. Holding that the exclusionary clause constitutes a negative warranty of seaworthiness implied by law, the Court explained:

> *The warranty is a continuing obligation that "the owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition...* The consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness" (emphasis added).

Board of Commissioners, 733 F.2d at 1165.

It is clear, in the Fifth Circuit, that the negative warranty standard, like the English rule for maritime time hull insurance policies, requires the insurer to establish the vessel owner had actual knowledge of the unseaworthy condition which caused the loss before coverage may be denied. Professors Gilmore and Black have also endorsed this standard, noting that, should this Court consider this issue, it will likely follow the English rule on the implied warranty of fitness which permits the insurer to exclude coverage *only* when the vessel owner had actual

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[5] For over 120 years American and English Courts have applied the same *privity or knowledge* standard to determine whether a vessel owner is entitled to a limitation of liability. Supplemental Rule F for Admiralty and Maritime Claims of The Federal Rules of Civil Procedure; *see, 3 Benedict, Admiralty* §§489-90 (6th ed. 1940).

knowledge of the unseaworthy condition. *G. Gilmore & C. Black, The Law of Admiralty,* §2-6 at 65 (2nd ed. 1975). The Eighth Circuit acknowledged the English rule and the Fifth Circuit's position on this issue. App. A at A-7. The Eighth Circuit, however, chose not to follow the English rule, and, instead held an owner's negligent failure to maintain his vessel in a seaworthy condition precluded recovery under the implied warranty of seaworthiness exclusion.

B. The Federal Precedents Relied On In The Opinion Do Not Support The Proposition That An Owner's Mere Negligence Constitutes A Failure To Exercise Due Diligence Within The Meaning Of Maritime Time Hull Insurance Policies.

The Eighth Circuit primarily relied upon three cases which the Court incorrectly characterized as approving a negligence standard for defects in seaworthiness which arise after commencement of the risk. Based upon its misplaced reliance on these three cases, the Eighth Circuit rejected the seminal case on the subject, and a recent, well-reasoned opinion of the Fifth Circuit which followed English maritime law and required an insurer to prove the insured had actual knowledge of a vessel's unseaworthy condition before denying recovery.

Two of the principal cases cited by the Eighth Circuit are simply not relevant. In *Union Insurance Co. v. Smith,* 124 U.S. 405 (1888), recovery was sought for the loss of a vessel under a policy issued by defendant. The insurance contract, unlike the insurance contract between L & L and INA, contained an *express* warranty of seaworthiness and *express* exclusion of loss caused by unseaworthiness or incompetence of the master. *See, G. Gilmore & C. Black, The Law of Admiralty,* §2-6 at 64. The *express* warranties permitted the insurer to exclude coverage upon a failure by the vessel owner to exercise reasonable care. On appeal, this Court upheld the jury verdict in favor of the insured. In dictum, this Court noted the warranty of seaworthiness, which is to be distinguished from the implied warranty of seaworthiness, discharges an insurer from any liability for

any losses resulting from the insured's failure to exercise reasonable prudence to remedy any defects in seaworthiness. 124 U.S. at 427. As the Eighth Circuit, several Courts and commentators have pointed out, the *Union Insurance* Court had no occasion to address the standard applied to a vessel owner under the implied warranty of seaworthiness. App. A at A-8; *see, Spot Pack,* 242 F.2d at 388-89 n.3; *New York and Puerto Rico Steamship Co. v. Aetna Insurance Co.,* 204 F. 255, 258 (2d Cir. 1913); *G. Gilmore & C. Black, The Law of Admiralty,* §2-6 at 65.

Another case relied upon by the Eighth Circuit in support of its definition of due diligence, *New York and Puerto Rico Steamship Co.,* 204 F. at 258, not only expressly held that the statements in *Union Insurance* were dictum, but did not involve a seaworthiness exclusion similar to the clause in INA's policy and is thus completely distinguishable.

The Eighth Circuit also placed unwarranted reliance upon *Seaman v. Enterprise Fire and Marine Ins. Co.,* 21 F. 778 (C.C. Mo. 1884). In *Seaman,* an insurance company declined coverage for the loss of a vessel which apparently left St. Louis without a starboard wing rudder. The Court instructed the jury that the vessel had to be seaworthy when it left St. Louis:

> So, when this boat left the Port of St. Louis, it should have been put in that reasonably safe and prudent condition which, having in view all the perils which might reasonably be expected it would encounter in the voyage, was sufficient to guard against those perils.

21 F. at 781. The Eighth Circuit erroneously cited this definition of what constitutes seaworthiness as support for its contention that the *Seaman* Court utilized a negligence standard for a vessel owner's duty in the context of the implied warranty of seaworthiness exclusion. App. A at A-8-9. In fact, the language relied on by the Eighth Circuit pertains to the definition of seaworthiness, thus the jury instruction as a whole in

Seaman begs the question and bears no relevance to the implied warranty issue in the present appeal because the Court's instructions in *Seaman* assumed the master of the vessel had actual knowledge of the unseaworthy condition - the lack of a starboard wing rudder. 21 F. at 782-83. In short, the jury instruction in *Seaman* dealt with, *inter alia,* the issue of the master's actions *after* he had actual knowledge of a vessel's unseaworthy condition. The holding in *Seaman* cannot be persuasive, much less, controlling on the different issue of whether a vessel owner must have actual knowledge of an unseaworthy condition *before* coverage may be denied under the implied warranty of seaworthiness exclusion.

For the foregoing reasons, the opinion of the Court of Appeals below conflicts directly with that of the Fifth Circuit in *Insurance Co. of North America v. Board of Commissioners, supra;* and deviates from the well-settled English rule on the exact issue. These conflicts justify the grant of certiorari to review the judgment below. Moreover, the decision below raises significant and recurring questions of federal law which have not been but should be settled by this Court.

II. The Decision Below Unjustifiably Conflicts With Prior Decisions Of This Court Holding Substantive Federal Maritime Law Should Conform With English Maritime Law In The Interpretation Of Marine Insurance Contracts.

Despite this Court's admonition that courts should endeavor to preserve general uniformity between federal maritime law and English maritime law in the interpretation of marine insurance contracts, *e.g., Standard Oil Co. v. United States,* 340 U.S. 54, 59 (1950); *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.,* 263 U.S. 487, 493 (1924), the Eighth Circuit, nevertheless, chose to deviate from settled English authority. Moreover, the Eighth Circuit failed to articulate any persuasive policy reasons which would favor rejec-

tion of the English rule and adoption of a negligence standard in the context of an implied warranty of seaworthiness which would increase the risk of vessel owners in the field of marine insurance.

In *Standard Oil Co. v. United States,* 340 U.S. at 59, this Court emphasized "the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts." The Court also reemphasized that "in interpreting insurance contracts reference should be made to considerations of business and insurance practices." *Id.* at 60, quoting *General Mutual Insurance Co. v. Sherwood,* 55 U.S. (14 How.) 351, 361-62 (1852). Both of these considerations, which were either ignored or given short shrift by the Eighth Circuit, mandate reversal of the Eighth Circuit's opinion.

The first consideration, uniformity between English and American law in the interpretation of marine insurance contracts, militates in favor of a standard whereby an owner's actual knowledge of an unseaworthy condition is necessary before coverage may be denied. As stated, the English rule has long required an owner's "knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the perils of the sea." *The Eurysthenes,* 2 All E.R. at 251. Deviation from the settled English rule presents a direct conflict with the precedents of this Court.

The considerations of business and insurance practice also favor the English rule and the Fifth Circuit's interpretation of that rule. The Eighth Circuit, in essence, has grafted onto the implied warranty of seaworthiness exclusion the same standard of care which is utilized in the carrier-shipper context as provided by the Carriage of Goods by Sea Act of 1936 (hereinafter "COGSA"), 46 U.S.C. 1301(1); cf., *Horn v. Cia de Navegacion Fruco, S.A.,* 404 F.2d 422, 428 (5th Cir. 1968) (submitted

by INA to the District Court as authority for its negligence instruction); even though the realities of the relationship between a vessel owner and insurer and a vessel owner and shipper are markedly different.

The distinction between the standard of care a vessel owner owes an insurer and a shipper is grounded on the common sense recognition of the inequality of bargaining power between the two. The shipper has no opportunity to make an investigation before selecting a vessel. It is only fair that the shipper be entitled to recovery upon a showing of the carrier's negligence in maintaining the vessel in a seaworthy condition. In contrast, the vessel owner and insurer are on equal bargaining terms. The insurer is under no compulsion to extend a contract of insurance to the vessel owner. Moreover, the insurer, as here, has the right and the opportunity to inspect the vessel at almost any time. It is therefore proper and equitable, and the English rule so recognizes, that the insurer should have the burden of showing the vessel owner's actual knowledge of an unseaworthy condition before coverage, when it is needed most, is excluded.

Furthermore, the Eighth Circuit's interpretation deprives the insured of the benefit of its bargain under the insurance contract. In accordance with settled maritime practice and the English rule, the insured has purchased a policy based on the understanding that coverage can only be denied upon the showing that the insured had actual knowledge of an unseaworthy condition. The Eighth Circuit's interpretation reduces the insured's coverage and bestows an unbargained for benefit to the insurance company in the form of a reduced risk.

Finally, the Eighth Circuit's opinion leads to the anomalous situation that an insured in New Orleans is entitled to coverage, whereas an insured in St. Louis is denied coverage, even though both negligently permitted their vessels to depart on a voyage in an unseaworthy condition. Such a result is an unwarranted burden upon interstate commerce, and can only engender uncertainty in the maritime industry.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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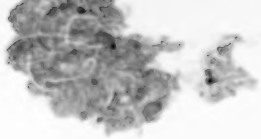

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1390

L & L Marine Service, Inc.,
Appellant,

v.

The Insurance Company of North America,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 13, 1986

Filed: July 16, 1986

Before McMILLIAN and JOHN R. GIBSON, Circuit Judges, and MURPHY,* District Judge.

JOHN R. GIBSON, Circuit Judge.

The capsizing of a barge with the unimaginative name P-2, resulting in its total loss, gives rise to this action by its owner and operator, L & L Marine Service, against its marine insurer,

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* The HONORABLE DIANA E. MURPHY, United States District Judge for the District of Minnesota, sitting by designation.

the Insurance Company of North America. The district court[1] dismissed all of L & L's claims except its claim under the time hull provision of the insurance policy, on which the jury returned a verdict in favor of INA. L & L argues on appeal that the district court erroneously instructed the jury that an exclusionary provision in the time hull policy absolved INA of liability for the loss if it were shown that L & L negligently permitted the barge to go to sea in an unseaworthy state. L & L asserts that the jury should have been instructed that INA could escape liability only if it were proved that L & L knowingly permitted the barge to go to sea in an unseaworthy state. L & L also argues on appeal that the district court erred in granting summary judgment on its claim for slander, and erred in not permitting it to amend its pleadings to show that INA waived certain conditions to indemnification of wreck removal expenses under the protection & indemnification provisions of the insurance policy, and thus avoid a directed verdict on that claim. We affirm the judgment of the district court.

In 1970, L & L purchased the P-2, an unmanned, all-welded box-style steel hopper barge measuring 190 feet long, 35 feet wide and 12 feet deep. The barge had a 3/8" hull, and contained fourteen buoyancy wing tanks, six on each side, and one each at the bow and stern. L & L restored the barge, built in 1957, and had it certified for use in ocean shipping. In 1981 INA issued a marine insurance policy on the P-2 to L & L. The policy contained a time hull coverage provision, with the following exclusion:

> This Company [INA] shall not be liable for any loss, damage, or expense arising out of the failure of the Assured [L & L] to exercise due diligence to maintain the Vessel in a seaworthy condition after attachment of this

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[1] The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri.

policy; the foregoing, however, not to be deemed a waiver of any warranty of seaworthiness implied at law.

In December 1982, the P-2 was towed to the Morton Salt facility on Weeks Island, Louisiana to carry a shipment of salt. L & L employees supervising the loading discovered a fractured weld in the hull, which they stopped by driving a wooden wedge into the fracture. The next day the barge was towed to L & L's facility in Pensacola, Florida. Jack Oldani, L & L's Vice President for Engineering and Maintenance, inspected the P-2 and had welds placed over the temporary repairs to the bow rake compartment made at Weeks Island, a small crack discovered in the number one starboard wing tank, and a small hole in the hull of the port wing tank, which had caused flooding on the journey. Oldani inspected the other tanks and discovered no other holes or water.

The following day the P-2 was towed to sea. Two days later the P-2 was observed listing badly. The next day, approximately 50 miles from Tampa, the barge capsized. After it was nudged onto a nearby beach, the barge was inspected by a representative of L & L and a number of marine surveyors hired by INA. The inspection revealed a one inch rust hole in the number one port wing tank; a one-half inch rust hole in the number three starboard wing tank; and a one-quarter inch rust hole in the number four starboard wing tank. All three holes were new and went completely through the hull of the barge. One of the marine surveyors was able to drive several holes in the hull simply by tapping it with a one pound surveyor's hammer. This surveyor also testified that it would take ten to fifteen years for the hull to deteriorate to this condition.

INA denied L & L's claim for total loss of the P-2, citing the provision in the time hull policy excluding liability for losses due to L & L's failure to exercise due diligence to keep the barge seaworthy. After INA informed L & L that it intended to decline coverage, a conference call was arranged between of-

ficials of INA, in Chicago, and officials of L & L, in St. Louis. L & L's Insurance Broker and Insurance Manager argued that L & L had properly maintained the P-2 and had done all it could to assure seaworthiness of the barge. During the discussion Regis Menke, Manager of Marine Claims for INA, disclaiming any accusations, suggested a scenario in which L & L, facing financial problems, towed the barge to sea and let it sink to recover the full value of the policy, which was substantially more than the market value of the barge.

L & L then initiated this action asserting claims for hull loss and indemnification for wreck removal expenses under the time hull and protection and indemnity (P&I) provisions of the policy, respectively; L & L also sought damages for bad faith and vexatious refusal to pay and for slander. The district court eventually dismissed L & L's bad faith claim, and directed a verdict on its claims for vexatious refusal to pay and for indemnification under the P&I policy; the court also disposed of L & L's slander charge on a motion for summary judgment. The case was submitted to the jury solely on L & L's claim under the hull policy. The jury returned a verdict for INA, and this appeal followed.

I.

INA's sole defense to L & L's claim under the hull policy was based on the exclusion requiring L & L to exercise due diligence to maintain the barge in seaworthy condition. The district court instructed the jury that "due diligence as used in these instructions means the exercise of care to be expected of a reasonably prudent vessel owner."[2] L & L argues that the district court er-

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[2] The relevant portion of the district court instructions reads:

> Your verdict must be for plaintiff unless you believe: That plaintiff failed to exercise *due diligence* to maintain the vessel in a seaworthy condition after July 1, 1982, the date of the attach-

red in instructing the jury that its mere negligence would absolve INA of its duty to cover the loss. L & L argues that the exclusionary clause was intended as nothing more than a statement of the implied warranty of seaworthiness read into all American Marine Insurance time policies, under which, L & L maintains, an insurer may deny coverage only if the jury finds that the insured had actual knowledge that the vessel was unseaworthy.[3] We conclude that the instruction is not erroneous.

We agree with the parties that the exclusion, which taken at face value sets a negligence standard, should be interpreted in light of the historical development of the implied warranty of seaworthiness. *Cf. Insurance Co. of North America v. Bordlee,* 507 F. Supp. 845, 847-48 (E.D. La. 1981) (identical exclusion provision in time hull policy is merely restatement of implied warranty of seaworthiness), *aff'd,* 733 F.2d 1161 (5th Cir. 1984).

American maritime law implies into every time hull insurance policy a warranty of seaworthiness. *See, e.g., Insurance Co. of*

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ment of the policy and that such failure caused the vessel P-2 to capsize and subsequently be sunk.

Your verdict must be for defendant if you believe that plaintiff failed to exercise *due diligence* to maintain the P-2 barge in a seaworthy condition at the start of the voyage from Pensacola, Florida on December 13, 1982, and that such failure caused the vessel P-2 to capsize and subsequently to be sunk.

* * *

The term *"due diligence" as used in these instructions means the exercise of care to be expected of a reasonably prudent vessel owner.*

Transcript IV at 89-90 (emphasis added).

[3] L & L's proposed instruction read in pertinent part: "[T]he Defendant must show that Plaintiff from bad faith and neglect knowingly permitted the vessel to break ground."

North America v. Board of Commissioners, 733 F.2d 1161, 1165 (5th Cir. 1984); *McAllister Lighterage Line v. Insurance Co. of North America,* 244 F.2d 867, 870-71 (2d Cir. 1957); *Saskatchewan Government Insurance Office v. Spot Pack, Inc.,* 242 F.2d 385, 388 (5th Cir. 1957); *Henjes v. Aetna Insurance Co.,* 132 F.2d 715, 719 (2d Cir. 1943); *Texaco, Inc. v. Universal Marine, Inc.,* 400 F. Supp. 311, 323 (E.D. La. 1975); *Nuebros Corp. v. Northwestern National Insurance Co.,* 359 F. Supp. 310, 315-16 (E.D.N.Y. 1972). *But see Gregoire v. Underwriters at Lloyd's, Combined Co.,* 559 F. Supp. 596, 598 (D. Alaska 1982) (rejecting American Rule, arguing cases actually state English Rule).[4] The American Rule, as it is so called, implies into a time policy two related warranties. The first is an absolute warranty by the assured that a vessel is seaworthy at the time that the insurance policy attaches. The second, which relates to defects of seaworthiness which arise after commencement of the risk, is a "negative, modified warranty, * * * that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." *Spot Pack,* 242 F.2d at 388. Breach of this "negative" warranty results in a denial of liability only for loss or damage proximately caused by the unseaworthy condition. *Id.* It is this negative warranty with which we are concerned today.

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[4] The English Rule for time policies is well settled:

> In a time policy there is no implied warranty that the ship shall be seaworthy at any state of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

Marine Insurance Act of 1906, 6 Edw. 7 c. 41, § 39(5). *See also Spot Pack,* 242 F.2d at 388; *Gregoire,* 559 F. Supp. at 598. The shipowner is only liable if he had "knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the perils of the sea." *The Eurysthenes,* [1976] 2 All E.R. 243, 251, *quoted in Gregoire,* 559 F. Supp. at 598.

The confusion in the standard by which a breach is defined arises from the unfortunate language in the crucial sentence in the Fifth Circuit's modern statement of the warranty in *Spot Pack,* that the negative warranty requires that the owner "from bad faith or neglect, will not knowingly permit" the vessel to sail in an unseaworthy condition. Thus are juxtaposed two, and arguably three different standards of intent. The Fifth Circuit, it appears, has held that the implied warranty adopts the more stringent "knowing" standard. *See Tropical Marine Products v. Birmingham Fire Insurance Co.,* 247 F.2d 116 (5th Cir. 1957), *cert. denied,* 355 U.S. 903 (1957); *Spot Pack,* 242 F.2d at 389-90.[5]

We believe, however, that the district court did not err in charging the jury that the policy exclusion requires only a finding of negligence. In *Union Insurance Co. v. Smith,* 124 U.S. 405 (1888), the Court upheld a jury charge which permitted an insurer to deny coverage under a time policy if it were proven that the master of a tug, which had developed a defect which rendered the vessel unseaworthy, was negligent in failing to put into an available port for repairs before proceeding to its home port for permanent repairs. The Court stated that "[A] defect of seaworthiness arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is a consequence of such bad faith, or want of prudence or diligence." 124 U.S. at 427. While acknowledging that this statement is dic-

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[5] There is, however, language in opinions of the Fifth Circuit and district courts within the circuit which suggest that the knowledge standard has not been consistently applied. *See Insurance Co. of North America,* 733 F.2d at 1165-66 (affirming district court judgment finding breach of implied warranty whether standard is due diligence, knowledge, or bad faith or neglect); *Lemar Towing, Inc. v. Fireman's Fund Insurance Co.,* 352 F. Supp. 652, 665 (E.D. La. 1972) (although stating the rule that breach requires actual knowledge, finding breach based on owner's negligence).

tum, several courts have held, or suggested in dicta, that this is the standard set by the implied warranty for defects in seaworthiness which arise after the commencement of the risk. *See New York & Puerto Rico Steamship Co. v. Aetna Insurance Co.*, 204 F.2d 255, 258 (2d Cir. 1913); *Seaman v. Enterprise Fire & Marine Insurance Co.*, 21 F. 778, 781 (C.C. Mo. 1884); *King v. Liverpool & London & Globe Insurance Co.*, 37 Misc. 2d 882, 238 N.Y.S.2d 799 (N.Y. Sup. Ct. 1964) (relying on *Berwind v. Greenwich Insurance Co.*, 114 N.Y. 231, 21 N.E. 151 (1889)).[6]

Additionally, of some significance is the fact that the Federal Circuit Court for the Eastern District of Missouri, the predecessor of this court, gave an instruction in a case some four years before *Union Insurance* clearly employing the negligence standard. *See Seaman v. Enterprise Fire & Marine Insurance Co.*, 21 F. 778, 781 (C.C. Mo. 1884). The circuit judge in that case charged the jury:

> So, when this boat left the port of St. Louis, it should have been put in that reasonably safe and prudent condition which, having in view all the perils which might reasonably

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[6] A number of courts have pointed out that the insurance contract in *Union Insurance* contained an express warranty of seaworthiness and express exclusion of loss caused by unseaworthiness or incompetence of the master. Thus the Court's announcement that an implied warranty of seaworthiness arises in a time hull policy at the time the policy attaches, and is complied with if the vessel is seaworthy at the time the policy attaches or, for defects occuring afterward, the defect did not result from the bad faith or negligence of the insured, is dicta. *See Spot Pack*, 242 F.2d at 388-89 n.3; *New York, New Haven & Hartford Railroad v. Gray*, 240 F.2d 460, 446 n.10 (2d Cir. 1957); *New York & Puerto Rico Steamship Co.*, 204 F.2d at 258; *see also* G. Gilmore & C. Black, *The Law of Admiralty*, § 2-6, at 65 (2d ed. 1975) (expressing doubt that Supreme Court will uphold implied warranty). Despite these initial misgivings, the American rule appears to have become relatively well embedded in federal maritime law. (See cases cited *supra* p.6).

> be expected it would encounter in the voyage, was sufficient to guard against those perils.

Id. at 781.

We are mindful of the Supreme Court's admonition that courts should endeavor to preserve the general uniformity between federal maritime law and English maritime law, *see Standard Oil Co. v. United States,* 340 U.S. 54, 59 (1950); *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.,* 263 U.S. 487, 493 (1924), and that under the latter, the insurer can deny recovery in a time policy only if the vessel is sent to sea in an unseaworthy state "with the privity [knowledge] of the assured." However, in light of the plain language of the clause in the insurance policy, the Supreme Court's statement in *Union Insurance,* and the views of the Second Circuit and the New York Court of Appeals, we conclude that the district court did not err in instructing the jury that a vessel owner who acts negligently fails to exercise due diligence.

II.

L & L next argues that the district court erred in disposing on summary judgment of its claim for slander. L & L contends that statements by Regis Menke, INA's Marine Insurance Manager, to L & L's representatives, during a conference call, suggested that L & L purposefully avoided making necessary repairs and permitted the P-2 to be towed to sea knowing that it would sink, to recover the full value of the insurance policy, which was substantially more than the barge was worth in its present condition.[7] The district court, looking to Missouri law,

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[7] Regis Menke, Manager of Marine Claims for INA, stated that he wished to pose another scenario. The exchange was:

> Regis Menke: "Can we be perfectly frank here?"
>
> Tom Rollins: "Yes."
>
> Regis Menke: "Your scenario, Tom, is possible. Let me try

concluded that Menke's statements were not actionable as slander per se because they did not directly charge L & L with the crime of attempting to defraud the insurance company, nor was that the only inference which could fairly be drawn from the statements. The court concluded that Menke did no more than "suggest * * * the hypothetical possibility that its financial problems had deterred or prevented [L & L] from properly maintaining the barge." *L & L Marine Service,* slip op. at 5. The court further held that under Missouri law, statements imputing commission of a crime are not slanderous per se unless the crime is punishable by imprisonment; since INA is a corporation and cannot be imprisoned, the court reasoned, statements of its representatives could not be slander per se. The court similarly rejected L & L's contention that the remarks were slander per se because they reflected adversely on L & L's fitness for its trade. The court held that Menke's statements had

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another one though."

Tom Rollins: "All right."

Regis Menke: "We've got an insured who's got some financial problems. Got a barge that. . . ."

Tom Rollins: "Okay."

Regis Menke: ". . . . but maybe we ought to tow this thing out to sea and let it sink and let the insurance company buy it from us for 300 grand as opposed to the 60 or 70 that it's worth on the market, and we'll put a few pennies in our pocket that will help us with our cash flow problem."

Tom Rollins: "Your scenario . . . ."

Regis Menke: "I don't want to accuse, don't misunderstand what I just said. But this is the real world and I think that scenario is also possible."

L & L Marine Service v. Insurance Company of North America, No. 83-2897C(B), slip op. at 2-3 (E.D. Mo. Jan. 25, 1985) (memorandum and order granting summary judgment on slander count).

nothing to do with the conduct of L & L's business, and, moreover, were not made to anyone who dealt with L & L in a business capacity.[8]

The district court did not err in holding that the allegedly defamatory statements do not constitute slander per se. Under Missouri law, statements affecting an individual in his business, trade, or profession, or imputing the commission of a crime, are slander per se, and the plaintiff need not prove actual damage to reputation or other damage to recover. *See Brown v. Kitterman,* 443 S.W.2d 146, 153 (Mo. 1969). However, where the accusation of crime or improper business practices is not direct, as is the case here, it must be the sole inference that can fairly be drawn from the statements. *See Walker v. Kansas City Star Co.,* 406 S.W.2d 44, 51 (Mo. 1966); *Houg v. Strauss,* 567 S.W.2d 353, 357 (Mo. Ct. App. 2978). We agree with the district court that the statements are susceptible of a non-criminal meaning. Indeed, L & L all but concedes this in its argument to this court that imputation of a crime is "a permissible inference." Brief of Appellant, at 40.

Therefore, the district court correctly held that the statements of Menke were not slander per se. Because L & L did not plead actual damage to reputation or other harm, the district court properly granted INA's motion for summary judgment on this claim.

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[8] The district court also held that there was no publication of the allegedly defamatory statements, since the only persons who heard them were employees or agents of L & L, who could not be considered third parties, and that, in any event, the statements were absolutely privileged since they were invited by or consented to by the agents of L & L. Finally, the district court found that the cause of action for slander originated in Illinois, and was not brought within the one-year Illinois statute of limitations, which is adopted by Missouri law under such circumstances. Because we agree with the district court that the statements were not slanderous per se under Missouri law, we need not address these alternative holdings.

III.

L & L further contends that the district court erred in directing a verdict on its claim for wreck removal expenses under the P & I provisions of the policy. L & L sought recovery under the P & I policy for indemnification of approximately $24,000 it owed a salvage concern for the removal of the capsized P-2. At trial, INA moved for a directed verdict on this count on the ground that L & L had failed to plead that it first paid the wreck removal expenses as required by the P & I provision. The district court granted the motion, finding that L & L failed to plead or prove that INA had waived the policy condition, and forbade L & L from introducing testimony to demonstrate that INA had waived the policy condition. L & L contends there that the district court erred in not permitting it to amend the pleadings to raise waiver, and introduce evidence relevant to the defense.

Federal Rule of Civil Procedure 15 permits a party to amend its pleadings, under certain circumstances, to conform to proof at trial. However, it is well settled that the decision to grant or deny an amendment to the pleadings is within the sound discretion of the district court, and will be reviewed on appeal for abuse of discretion only. *Corsica Livestock Co. v. Sumitomo Bank,* 726 F.2d 374, 377 (8th Cir. 1983); *Tatum v. Frisco Transportation Co.,* 626 F.2d 55, 59 (8th Cir. 1980).

The district court found that L & L not only failed to plead waiver, an affirmative defense, but conceded in their pleadings that all the policy conditions had been met. It was not until late in the trial that L & L attempted for the first time to present evidence that INA had waived the policy condition requiring the assured to prepay all wreck expenses to be indemnified. We cannot conclude that the district court abused its discretion in denying L & L leave to amend its complaint late in the proceedings. Nor can we say that INA impliedly consented to try this issue by failing to object to evidence relevant to the issue. *See Corsica*

Livestock Sales, Inc., 726 F.2d at 377; *Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 275 (8th Cir. 1978). INA objected each time L & L sought to introduce evidence on this question.

Since L & L failed to plead waiver, and was not improperly denied leave to amend its complaint to plead waiver, the district court properly directed a verdict on its count for recovery under the P & I provisions of the insurance policy.

We affirm the judgment of the district court.

A true copy.

Attest:

U. S. Court Of Appeals, Eighth Circuit.

APPENDIX B

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2897C(B)

L & L Marine Service, Inc.
Plaintiff,

vs.

The Insurance Company of North America
Defendant.

MEMORANDUM AND ORDER

(Filed Feb. 26, 1985)

For consideration is plaintiff's motion for judgment notwithstanding the verdict or in the alternative for a new trial.

The original complaint, in five counts, filed December 16, 1983, sought recovery for losses and damages resulting from a barge casualty allegedly covered by a policy of insurance issued by defendant. An additional count claiming damages based on allegedly defamatory slanderous statements by a representative of defendant was added by an amended complaint filed October 17, 1984.

In Count I, the only count submitted to the jury, plaintiff sought judgment of $300,000 the agreed value of the barge for insurance purposes as of the issuance of the policy. The sole issue was whether plaintiff had failed to exercise due diligence to maintain the barge in a seaworthy condition as required by the policy and whether such failure caused the casualty. By its verdict, adverse to plaintiff after an eight day trial, the jury found such failure and causation. In our judgment, the evidence was adequate to support the verdict. We also are of the opinion that

plaintiff's claim of error in the Court's evidentiary rulings on Count I are lacking in merit, as are its objections to the giving and refusal of instructions.

Count II is based on another portion of the policy by which defendant agreed to pay plaintiff certain costs and expenses, provided plaintiff not only incurred such expenses but had paid them and submitted proof thereof to defendant. The evidence was undisputed that other than the amounts which defendant had theretofore reimbursed plaintiff, plaintiff had not paid the amount claimed by it, so that there was a failure of proof of plaintiff's entitlement to said amount. The sole claim of error is that the Court excluded testimony which was offered to show that defendant had waived the policy requirement. However, plaintiff not only did not plead any waiver, but pleaded that all conditions of the policy had been met. Waiver is an affirmative defense which is required to be pleaded. Rule 8(c) F.R.C.P. The evidence was properly excluded.

Count IV[1] seeks damages pursuant to Section 375.420 RSMo. for vexatious refusal to pay plaintiff's loss. Plaintiff claims error in the exclusion of certain evidence which it contends is relevant to this claim. However, by the very terms of the Missouri statute, such damages can be awarded in a proper case *only "in addition"* to the amount of the loss, *not independently thereof,* with judgment to be entered for the *aggregate* sum found in the verdict. Hence, although it is well settled that the mere fact the verdict on the policy is adverse to the insurer does not of itself entitle the insured to such additional damages, it should be obvious that where, as here, the insurer prevails on

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[1] Count III pertained to the alleged failure of defendant to defend a claim against plaintiff by the owner of the cargo, thus subjecting plaintiff to the expense of defending (should suit be brought on such claim). Admittedly, defendant has settled the claim. In effect, the claim was abandoned, in that no evidence was adduced by plaintiff on this count, and the motion for judgment or new trial makes no reference thereto.

the merits of the insured's claim, there is not the slightest basis for a damage award. Thus, not only was the evidence properly excluded in our opinion, but, more importantly, the verdict of the jury adverse to plaintiff foreclosed any right to recover on *its additional* claim for damages. Cf. *State ex rel U.S. Fidelity & Guaranty Co. v. Walsh,* 540 S.W.2d 137, 141 (Mo.App. banc 1976).

Count V purports to state a claim for the alleged breach of defendant's implied covenant to deal fairly and in good faith with plaintiff on its claims covered by the policy by "tortiously, wrongfully, unreasonably and maliciously" refusing to pay plaintiff's claims under its policy.

On April 12, 1984, we sustained defendant's motion to dismiss Count V when it was pleaded as part of plaintiff's original petition. Subsequently, it was restated as part of the amended complaint, but was later dismissed pursuant to the stipulation of the parties on the sole basis that the claim had theretofore been dismissed. The purpose of refiling Count V was to preserve plaintiff's claim of alleged error for appellate review if plaintiff so chose.

We remain of the opinion that Count V fails to state a claim for relief. As stated in *Varnal v. Weathers,* 619 S.W.2d 825, 827 (Mo.App. 1981), "The cause of action in tort for breach of the obligation of fair dealing presupposes an insurer and insured in a subsistent *fiduciary* relationship "(T)he *mere* relationship of insurer and insured (does not) import an obligation of trust." At most (or worst) a wrongful refusal to pay an insured's claim is a breach of contract for which in a proper case the law permits a recovery of damages for vexatious refusal in addition to the amount recoverable under the policy. We add that the verdict of the jury adverse to plaintiff on the merits is a further reason supportive of the dismissal of Count V.

By the remaining Count VI, damages were sought based on an allegedly slanderous statement uttered more than a year prior

to the filing of this claim. This Count was added to the complaint by the October 17, 1984 amendment. For reasons set forth at length in our Memorandum dated January 25, 1985, we granted summary judgment to defendant with respect to this Count. Plaintiff's motion complains of our ruling. Although we find nothing therein which persuades us to change our ruling, we will briefly comment upon three complaints which were not addressed in our Memorandum.

In our ruling, we noted that words allegedly imputing the commission of a crime are not slanderous per se even as to an individual, unless the crime is punishable by imprisonment, and that in any event even if (contrary to our holding) the words imputed a crime to plaintiff, the crime could not, by reason of plaintiff's corporate status, be punishable by imprisonment. Plaintiff argues that "(c)learly some one with the corporation could have been imprisoned if defendant's defamatory remarks were true." The short answer is that even if the contention were true,[2] the "some one" is not the plaintiff on this claim.

In our Memorandum, we also adverted to the fact that (in the presence and hearing of counsel) we listened to the relevant portion of the tape on which the allegedly slanderous remarks were recorded. Plaintiff now asserts (for the first time) that we should have listened to the entire tape. What plaintiff overlooks is the portion we listened to is the *only* part of the conversation which plaintiff contended (and still contends) was

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[2] Plaintiff cites various sections of Title 46, U.S.C., only one of which, §10908, refers to a penalty, including imprisonment. That section provides such a penalty for a *person* who sends or attempts to send a vessel to sea in an unseaworthy condition "*that is likely to endanger the life of an individual.*" Nothing in the statement complained or even implied that towing the barge to sea would endanger the life of any one, if for no other reason than that there would be no person on the barge. More importantly, all the sections cited (other than §658) were enacted August 26, 1983, long *after the loss occurred* and *after* the statement was made.

slanderous, both in its pleadings and in the papers filed in opposition to the motion for summary judgment. We deemed it desirable to hear the words as they were uttered in order to check the accuracy of the transcript (which contained *only* that portion) as well as the manner and tone in which they were uttered. Plaintiff (which has the entire tape), points to no other portion of the tape which makes the words any *more defamatory* than the quoted portion.

As a further ground for our ruling we held that plaintiff's Count VI claim was barred by limitations. Plaintiff now argues, citing Rule 15 and *William Inglis, Inc. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1057 (9 Cir. 1981) that as a matter of law, the slander claim related back to the initial filing of the complaint and could not be barred by limitations. The *Inglis* case pertained to the right to file a supplemental pleading setting forth transactions or occurrences which have happened *since* the date of the pleading sought to be supplemented. The slander claim arose some six or more months *before* the suit was filed. We also note that the *Inglis* court commented that if the supplemental claims "rely on conduct or events *different* from those involved in the original action [as distinguished from conduct of a continuing nature], the statute of limitations should be applied." In our judgment, the claim for slander is not an *amendment* of any of the preceding five counts, but is an entirely different "transaction." As such, it cannot relate back.

Plaintiff further argues that inasmuch as limitations were not pleaded as an affirmative defense (Rule 8(c) F.R.C.P.), the Court should not have relied thereon. Wholly aside from the fact that summary judgment was mandated without regard to the statute of limitations, what plaintiff overlooks is that, comparably to the principle that where the complaint *on its face* shows that the limitation period has run, an action is properly subject to dismissal for failure to state a claim (see *Gay v. Swift & Co.*, 612 F.2d 383, 385 (8 Cir. 1980)), it should follow that summary judgment is also proper where the *undisputed facts*

show that the limitation period has run. And even now, plaintiff disputes *only the applicability* of the statute, not the *facts* upon which we found that it applies.

Plaintiff's motion for judgment notwithstanding the verdict or in the alternative for a new trial should be and is hereby OVERRULED.

Although we have ruled the motion strictly on the merits, we are, nevertheless, impelled, in order to avoid the impression that silence implies consent, to briefly mention several statements, sprinkled and repeated several times in the course of plaintiff's Motion and Memorandum, which reflect upon the Court's integrity and impartiality, such as, the Court's "obvious displeasure with plaintiff's claim", "the Court's hostility to plaintiff's claim", the action of the Court "futher evinced the Court's animus toward plaintiff's claim", the "belittling of plaintiff's counsel in the presence of the jury", and finally, "The Court's conduct patently revealed the Court's displeasure with plaintiff's claim and poisoned the entire atmosphere in the courtroom." These insulting statements, unsupported by the record, are wholly unwarranted, particularly when made by an experienced attorney.

We add that counsel inexcusably persisted in arguing with the Court in the presence of the jury whenever an adverse ruling was made. Although Court and counsel may differ in their view of the law, the proper representation of a client does not justify an attorney in venting his spleen upon the Court, even for the purpose of saving face by justifying to his client the fact he was unsuccessful in litigating his client's claim.

Dated this 26th day of February, 1985.

/s/ John K. Regan
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 83-2897C(B)

L & L Marine Service, Inc.,
Plaintiff,

vs.

The Insurance Company of North America,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable John K. Regan, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict.

It is ORDERED and ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff its costs of action.

EYVON MENDENHALL
Clerk of Court

/s/ Sherry Compton
deputy

Dated at St. Louis, Missouri
this 16th day of January, 1985.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1390EM

L & L Marine Service, Inc.,
Appellant,

vs.

The Insurance Company of North America,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

July 16, 1986

Costs of briefs of appellee for recovery from appellant: $148.53.

Order entered in accordance with opinion.

Clerk, U.S. Court of Appeals, 8th Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1390-EM

L & L Marine Service, Inc.,
Appellant,

vs.

The Insurance Company of North America,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 27, 1986

Order Entered at the Direction of the Court:

Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 83-2897-C(B)

L & L Marine Service, Inc.,
Plaintiff,

vs.

The Insurance Company of North America,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that L & L Marine Service, Inc., the Plaintiff in the above captioned action, hereby appeals to the United States Court of Appeals for the 8th Circuit from the final judgment of this Court entered in this action on February 26, 1985.

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THOMPSON & MITCHELL

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